

REMARKS

This Response is submitted in reply to the non-final Office Action mailed on September 27, 2006. No fee is due in connection with this Response. The Director is authorized to charge any fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-520 on the account statement.

Claims 1-20 are pending in this application. In the Office Action, Claims 1-18 are rejected under 35 U.S.C. §103(a). Claims 1-20 are provisionally rejected under 35 U.S.C. §101. For the reasons set forth below, Applicants respectfully submit that the rejections are improper and should be withdrawn.

In the Office Action, Claims 1-18 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,445,678 to Whistler (“*Whistler*”) in view of Mrs. Bateman’s (“*Mrs. Bateman’s*”). Applicants respectfully disagree with and traverse this rejection for at least the reasons set forth below.

Independent Claim 1 recites, in part, a reduced-fat flavored coating comprising a sugar matrix of sugar crystals and sugar glass in an amount effective to provide the coating with sufficient structural integrity to prevent flowability at temperatures less than about 40 °C and a plurality of microspheres comprising a dry hydrocolloid component that are dispersed through the flavoring agent and sugar matrix. In contrast, Applicants respectfully submit that there is no suggestion or motivation to combine the cited references to obtain the present claims, and even if combinable, all of the claimed elements are not taught or suggested by the cited references.

Applicants respectfully submit that one having ordinary skill in the art would not be motivated to combine *Whistler* and *Mrs. Bateman’s* to arrive at the present claims. For example, Applicants respectfully submit that references must be considered as a whole and those portions teaching against or away from the claimed invention must be considered. *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443 (Fed. Cir. 1986). “A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant.” *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998) (quoting *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994)).

In its attempt to arrive at the present claims by combining the cited references, the Patent Office has ignored significant portions of each reference that teach away from the combination. For example, *Whistler* is said to impliedly disclose the use of microspheres in the formulation of its composition in the Background and Summary of the Invention. However, *Whistler* does not disclose or even suggest the use of microspheres anywhere in the disclosure. In fact, as is clearly indicated in the Background and Summary of the Invention, the microcrystalline starch composition comprises irregularly shaped starch particles. *Whistler*, therefore, teaches away from the present invention, which requires, in part, the use of a plurality of microspheres comprising a dry hydrocolloid component.

Further, in the Office Action, the Patent Office asserts that pages 101 and 108 of *Mrs. Bateman's* disclose a frosting that is prepared from a recipe that does not include water. See, Office Action, page 3. However, Applicants note that page 12 of *Mrs. Bateman's* lists water as the second main ingredient in *Mrs. Bateman's Baking Butter™*, which is used to prepare the frosting on pages 101 and 108. As the second listed ingredient in the frosting, it can be assumed that the water comprises a significant portion of the frosting composition. *Mrs. Bateman's*, therefore, teaches away from the present invention, which requires, in part, a flavored coating that is at least substantially anhydrous. Because the cited references teach away from the claimed invention, the skilled artisan would have no reasonable expectation of success in combining the cited references to arrive at the present claims.

What the Patent Office has done is to rely on hindsight reconstruction of the claimed invention. Applicants respectfully submit that it is only with a hindsight reconstruction of Applicants' claimed invention that the Patent Office is able to even attempt to piece together the teachings of the prior art so that the claimed invention is allegedly rendered obvious. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548 (Fed. Cir. 1983); 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995); 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075 (Fed. Cir. 1988).

Applicants also respectfully submit that, even if combinable, all of the claimed elements are not taught or suggested by the cited references. For example, *Whistler* fails to disclose or

suggest a reduced-fat flavored coating comprising a sugar matrix of sugar crystals and sugar glass in an amount effective to provide the coating with sufficient structural integrity to prevent flowability at temperatures less than about 40 °C. *Whistler* also fails to disclose or suggest a plurality of microspheres comprising a dry hydrocolloid component that are dispersed through the flavoring agent and sugar matrix. The Patent Office admits same. *See*, Office Action, pages 2-3. Finally, *Whistler* fails to disclose or suggest a flavored coating that is at least substantially anhydrous as required, in part, by Claim 1.

Mrs. Bateman's is also deficient with respect to the present claims. For example, *Mrs. Bateman's* fails to disclose or suggest a sugar matrix of sugar crystals and sugar glass in an amount effective to provide the coating with sufficient structural integrity to prevent flowability at temperatures less than about 40°C as required, in part, by Claim 1. *Mrs. Bateman's* also fail to disclose or suggest a plurality of microspheres comprising a dry hydrocolloid component that are dispersed through a flavoring agent and sugar matrix as required, in part, by Claim 1. Instead, *Mrs. Bateman's* is directed toward cookbook recipes using *Mrs. Bateman's Baking Butter™* as a fat replacement ingredient, which is described as comprising, in part, Maltodextrin, water, butter and oil. Finally, *Mrs. Bateman's* fails to disclose or suggest a flavored coating that is at least substantially anhydrous as required, in part, by Claim 1 and actually teaches away from same as discussed previously.

For at least the reasons discussed above, the combination of *Whistler* and *Mrs. Bateman's* is improper. Moreover, even if combinable, *Whistler* and *Mrs. Bateman's* do not teach, suggest, or even disclose all of the elements of Claims 1 and Claims 2-18 that depend from Claim 1 and thus, fail to render the claimed subject matter obvious.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claims 1-18 be reconsidered and the rejection be withdrawn.


In the Office Action, Claims 1-20 have been provisionally rejected under the 35 U.S.C. §101 as claiming the same invention as that of U.S. App. No. 10/596,157. Applicants respectfully submit that, at this state of the prosecution, the instant claims have not yet been allowed, and thus, the final version of these claims is not yet known. However, upon allowance of either the current application or U.S. App. No. 10/596,157, Applicants will amend the non-allowed patent application claims to recite distinguishable subject matter.

Accordingly, Applicants respectfully request that the provisional rejection of Claims 1-20 be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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